NEW MEADOWLANDS STADIUM COMPANY, LLC, NEW YORK JETS LLC, JETS STADIUM DEVELOPMENT LLC, NEW YORK FOOTBALL GIANTS, INC., AND GIANTS STADIUM LLC, Plaintiffs, vs. TRIPLE FIVE GROUP, LTD., AMEREAM LLC, METRO CENTRAL LLC AND NEW JERSEY SPORTS AND EXPOSITION AUTHORITY Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY Docket No. BER-C-000193-12 CIVIL ACTION

DEFENDANTS TRIPLE FIVE GROUP, LTD., AMEREAM LLC, AND METRO CENTRAL LLC'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Through this premature lawsuit, Plaintiffs are attempting to circumvent an ongoing statutorily authorized administrative process in which Plaintiffs have been actively participating for the past eight months. In that administrative process, which has already included. and will continue to include, public hearings and the opportunity for submissions, the New Jersey Sports & Exposition Authority (the "NJSEA") will necessarily address and make factual findings with respect to the same issue raised by Plaintiffs in this lawsuit. Plaintiffs, however, have attempted to unilaterally withdraw from the process and start anew in what they perceive to be a better forum.

The present lawsuit is therefore nothing more than a naked attempt by Plaintiffs to do an end-run around the administrative process when that process is nowhere near complete or final. New Jersey courts have long recognized that Plaintiffs' approach is inappropriate and should not be countenanced, as there is a clear public policy in favor of deferring to agencies' expertise. Plaintiffs have actively participated in the administrative proceedings, but have not made any showing in support of the alleged "adverse effect" they are claiming here; it is therefore improper and inefficient to allow Plaintiffs to simply short-circuit the process and proceed with a lawsuit at this time. Under New Jersey law, the Court should not allow such blatant forum-shopping and should defer to the NJSEA, the entity designated with plenary authority over the issues that form the crux of this lawsuit.

Dismissal of this case is compelled by several legal principles. First, the lawsuit is simply not ripe because the administrative process is still ongoing.[1] There is no justiciable case

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[1] As set forth below, the administrative process being followed here in connection with the modifications to the Xanadu Master Plan is the one articulated in N.J.S.A. 5:10-5(x) and N.J.S.A. 5:10-23, as interpreted and further defined by the Appellate Division in In the Matter of Hartz Mountain Indus., Inc., 2006 WL 2371348 (App. Div. 2006) and In the Matter of the Proposed Xanadu Redevelopment Project, 402 N.J.

or controversy until the NJSEA has made a final determination as to the proposed modification to the Xanadu Master Plan that is purportedly affecting Plaintiffs' rights. On June 28, 2012, the NJSEA announced that it intends to solicit the comments and submissions of the parties and conduct public hearings on issues directly relevant to Plaintiffs' claims: whether the proposed modifications to the Xanadu Master Plan will have any "effects" on Plaintiffs' development, use or operation of the MetLife Stadium (the "June 28th Letter"). See Exhibit A attached hereto. In addition, by letter dated July 5, 2012, the NJSEA advised that the parties' submissions are due by July 20, 2012 and that both sides will have the opportunity to be heard by the Master Plan Committee as to these issues. See Exhibit B attached hereto. As a result, until this administrative process is complete and a final resolution issued, the NJSEA could alter, modify or amend the proposed modifications to the Xanadu Master Plan in a manner that may mitigate any perceived "adverse effect" on Plaintiffs' contractual rights. At that point, the Plaintiffs may have the right to appeal to the Appellate Division which can then confirm or reject the NJSEA's findings; however, unless and until the administrative process is allowed to run its course, there is simply no way to know. Plaintiffs' claims of alleged harm in this lawsuit are therefore speculative and not ripe for adjudication.

Second, even if this Court had jurisdiction to hear this case at this time, under both the doctrines of primary jurisdiction and exhaustion of administrative remedies, the factual determinations upon which Plaintiffs' claims turn should be made by the various agencies with expertise in this area, namely the NJSEA, the New Jersey Department of Transportation (the

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Super. 607, 617 (App. Div. 2008). It is thus the same process that was followed with respect to the predecessor project (Xanadu), between 2003-2004, which process was approved by the Appellate Division in both of those cases. Indeed, the Law Division dismissed an action filed by Hartz as premature. See pp 8 - 9, infra. In addition, the same process was followed with respect to approval of the Plaintiff's application to build a new stadium.

"NJDOT"), the New Jersey Department of Environmental Protection (the "NJDEP") and other administrative agencies tasked by the legislature to perform such functions. Permitting the agencies to exercise that expertise will result in a fully-developed record and will avoid piecemeal findings and inconsistent results.

Third, Plaintiffs' tortious interference claim against Triple Five Group, Ltd., Ameream LLC and Metro Central LLC (collectively, the "Developers") must be dismissed because there can be no tortious interference claim as a matter of law based on the conduct alleged in the Complaint. New Jersey courts have long recognized, consistent with the Noerr-Pennington doctrine and its progeny, that the Developers have a constitutional right to petition government agencies, which is all the Complaint alleges the Developers did here.

BACKGROUND

A. The Pending Administrative Proceedings and Plaintiffs' Active Participation Therein

On June 28, 2002, the NJSEA sought a master developer to develop the Meadowlands Sports Complex by soliciting bids. See In the Matter of Hartz Mountain Indus., Inc., 2006 WL 2371348 *2 (N.J. App. Div. August 17, 2006) (copies of all unreported cases are attached to this brief in Exhibit C). On February 12, 2003, in adopting Resolution 2003-11, the NJSEA selected a joint proposal by the Mills Corporation and Mack Cali Realty Corporation ("Mills/Mack-Cali") to build the Xanadu Project. Id. at *5.[2] In April of 2005, the Giants filed suit against the NJSEA and Mills/Mack-Cali seeking to prevent construction of the Xanadu Project. (Complaint ¶ 23).

[2] The "Xanadu Project" is the redevelopment project at the Meadowlands Sports Complex constructed (or to be constructed) on a portion of the Complex located east of Route 120 (sometimes commonly known as the "Arena site"). The Xanadu Project consists of several components: an entertainment/retail component; two office building components; one hotel building component; a baseball stadium component; and other related ancillary components, such as parking facilities and other infrastructure improvements.

The parties engaged in settlement negotiations, which resulted in the dismissal of the lawsuit, and the execution of a Cooperation Agreement (attached as Exhibit A to Plaintiffs' Complaint) dated November 22, 2006. According to the Complaint, the Cooperation Agreement provides that "[a]ny amendments, modifications and/or waivers with respect to the Xanadu Project that would have an adverse effect on the development, use or operation of the Stadium Project Development Rights . . . shall require the prior written consent of the [Plaintiffs]." (emphasis added) Consent is only required if a modification would have an adverse effect on Plaintiffs' development rights, not could have or may have. Importantly, in the same agreement, Plaintiffs consented to and waived any objection they may have to the Xanadu Project, including the development, construction, operation and exclusive use rights granted to Mills/Mack-Cali by the NJSEA. (Complaint ¶ 2) In exchange for this waiver, the prior developer both made a $15,000,000 lump sum payment to the Plaintiffs and gave up certain exclusive development rights, which allowed Plaintiffs additional ancillary development rights in connection with their building of MetLife Stadium, including being permitted to increase the size of the Stadium.

In 2006, Mills/Mack-Cali encountered financial difficulties which halted construction on the Xanadu Project. (Complaint ¶ 31) Thereafter, another developer took control over the construction and development of the Xanadu Project; however it encountered financial difficulties as well. On May 3, 2011, the Developers announced a proposal to acquire and develop the Entertainment Retail Component (the "ERC") of the Xanadu Project, renaming it the "American Dream at Meadowlands." (Complaint ¶ 32)

Pursuant to Section 6.2 of the Xanadu Project's Redevelopment Agreement, the NJSEA is currently in the process of reviewing the Developers' proposed modification to the Xanadu Master Plan. The NJSEA conditionally approved the conceptual design of the proposed

modification on October 13, 2011. The NJSEA's approval started the administrative process set forth in N.J.S.A. 5:10-5(x) and N.J.S.A. 5:10-23, the same process followed by the NJSEA in 2003 and 2004 in connection with the approval of the original Xanadu Project, as well as the same process followed with respect to the Plaintiffs' application to build a new stadium.

To date, Plaintiffs have actively participated in the administrative process. If Plaintiffs did not participate more fully it was of their own volition, as they were provided timely notice and given every opportunity to be heard. There were two days of public hearings held jointly by the NJDEP and NJMC in November 2011. Subsequently, during the comment period, in or around January 2012, Plaintiffs, through their attorneys at Sullivan & Cromwell, raised the same objections that they raise in this lawsuit; the time period for comments was even extended once upon the request of the Plaintiffs.

On March 1, 2012, Plaintiffs' attorneys at McCarter & English submitted a letter to the NJDOT objecting to the issuance of a major access permit to the Developers for the American Dream Project and asserting the very contract rights asserted in this lawsuit.[3] The letter did not, however, contain or refer to any traffic data, studies or reports of any kind to rebut the information contained in the Developers' traffic consultant's report. NJDOT responded directly to the issues raised by the McCarter & English letter by response dated March 1, 2012. Thereafter, on May 10, 2012, the NJDOT issued the permit. In doing so, the NJDOT, which had already addressed any impact on traffic resulting from the Xanadu Project in 2006, determined that there was no significant increase in traffic due to the modifications to the Xanadu Master Plan as a result of the American Dream Project and that no further infrastructure improvements were needed. As part of the NJDOT process, Plaintiffs were afforded the opportunity to submit

[3] While the consultation process went forward, the Developers applied for the permits necessary to construct the project from NJDEP and the NJDOT.

detailed traffic studies, analyses or expert reports to rebut or respond to the report submitted by the Developers' traffic consultant, but they submitted none.[4]

By letter dated June 28, 2012, the NJSEA announced that it intends to hold public hearings in which it will consider submissions from the parties concerning any effect on the Stadium Entities' development, use or operation of the stadium as a result of the expanded project. The text of the June 28th Letter is as follows:

> Pursuant to section 6.2 of the Redevelopment Agreement, the New Jersey Sports & Exposition Authority ("NJSEA") is in the process of reviewing a proposed "major modification" to the Master Plan submitted on behalf of Triple Five and related entities. As the parties are aware, a resolution conditionally approving the "conceptual design" of this proposed modification was adopted by the NJSEA on October 13, 2011.
>
> As part of the NJSEA's review process—as outlined in the Redevelopment Agreement—the NJSEA's Master Plan Committee will conduct a hearing to review the proposed "major modification" and its conformity with the Master Plan. As part of the review process, the Master Plan Committee will consider any effects the "major modification" may have on the Stadium Entities' development, use or operation of the stadium.
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> The NJSEA will, in short order, advise all interested parties of the date, time and logistics of the hearing, as well as a schedule for written submissions.

By letter dated July 5, 2012, the Master Plan Committee advised the Developers and the Stadium Entities that their submissions "in support of, or in opposition to, Triple Five's proposed 'major modification'" were due by no later than 2:00 p.m. on July 20, 2012. The July 5th letter further stated that, following its review of the submissions, the Master Plan Committee will advise the parties of the time and date of the hearing at which "each interested party will be

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[4] Similarly, the Complaint in this case contains only conclusory allegations concerning a purported "adverse effect" on Plaintiffs resulting from the proposed modification to the Xanadu Master Plan. The Complaint is utterly devoid of any reference to studies, analyses or data supporting Plaintiffs' contention that such "adverse effects" will materialize if the Project is permitted to proceed. See, e.g., Complaint ¶¶ 3, 37.

provided with the opportunity to address the Committee." Thus, Plaintiffs still have every opportunity to be heard, to make written submissions and to otherwise participate in the administrative process.

B. The Administrative Process is Nowhere Near Complete or Final

At the time Plaintiffs commenced this suit, the statutory process, as developed by the Appellate Division (described more fully in Section C below) was already underway; however, that process is not now complete or even close to final. Before NJSEA is even permitted to undertake a vote on Developers' proposed modification, it must consider the report from the NJMC and NJDEP (the Joint Hearing Officers' Report),[5] and decide to agree, disagree, and/or modify the findings therein. In conjunction with its statutory obligations, the NJSEA will be conducting the process described in the June 28th Letter. Following completion of that process, the NJSEA then has to adopt a resolution stating that the NJSEA accepts the Joint Hearing Officers' Report and any conditions contained therein relating to the NJSEA's approval of the Xanadu Master Plan modification. Until such time as such a resolution is adopted, changes can be made to the approvals and documents. Furthermore, any aggrieved party can file an appeal from the NJSEA's resolution directly to the Appellate Division.

Central to the NJSEA's final determination is its consideration of the very issues raised in this Complaint concerning the effects, if any, of the proposed modification upon Plaintiffs' development, use or operation of the stadium. Given all the available administrative avenues through which the Plaintiffs can pursue and address their concerns as to any potentially "adverse

[5] The Hearing Officers' Report is prepared jointly by NJMC and NJDEP, and provides input and recommendations to the agencies based upon written submissions and hearings as to the effect, if any, the proposed modification may have on the Meadowlands environment, including traffic. NJMC approved the Hearing Officers' Report on June 27, 2012, while the NJDEP approved it on June 28, 2012, at which time it became the Joint Hearing Officers' Report.

effect" caused by the American Dream Project, with the ultimate ability, if necessary, to appeal any resolution or final determination by the NJSEA directly to the Appellate Division, this complaint should be dismissed until (1) the administrative process is complete and (2) a case or controversy actually exists.

C. Historical Perspective as to How this Statutorily Mandated Administrative Process Was Applied by NJSEA with Regard to the Xanadu Project

The administrative process described above, which Plaintiffs are attempting to bypass through the filing of this lawsuit, is mandated by statute. The NJSEA was created by the legislature in 1971 for the express purpose of, among other things, determining the location, type and character of projects in the Hackensack Meadowlands. N.J.S.A. 5:10-4. Prior to undertaking any project, however, the NJSEA is statutorily obligated to undergo an exhaustive administrative process. Specifically, in accord with N.J.S.A. 5:10-5(x) and N.J.S.A. 5:10-23, "before a project is undertaken by NJSEA, it must consult with the NJMC concerning the location, type and character of the project, and it must consult with the NJMC and NJDEP with respect to any ecological impact to the Hackensack Meadowlands which may emanate from a proposed project." In the Matter of the Proposed Xanadu Redevelopment Project ("In re Xanadu"), 402 N.J. Super. 607, 617 (App. Div. 2008). What the legislature meant by "consult" and a discussion of the specific implementation of N.J.S.A. 5:10-5(x) and N.J.S.A. 5:10-23 were the subject of interpretation by the New Jersey Supreme Court in two cases: N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1 (1972) and In re Sports Complex Hackensack Meadowlands, 62 N.J. 248, cert. denied 414 U.S. 989 (1973). Under those cases, in order to fulfill its statutory mandate, the NJSEA must submit to NJMC and NJDEP a written description of its proposed project as well as an Environmental Impact Statement. NJMC and NJDEP must hold public hearings and allow for public comment. NJMC and NJDEP must then provide an

opinion which informs NJSEA of its views. The NJSEA must then carefully consider these opinions at each stage, giving every consideration to the concerns and conditions raised in those opinions and issue its own determination. In re Xanadu, 402 N.J. Super. at 629-30. As explained above, the parties are currently in the midst of this process.

The New Jersey Legislature, the New Jersey Supreme Court and the Appellate Division have painstakingly set out the process described above, which was designed to ensure due process for any interested parties and the public at large. Through the filing of this action, Plaintiffs have sought to bypass the entire administrative process and the findings required by it, in order prematurely to seek judicial relief with this Court.

This same administrative process was followed by NJSEA, Mills/Mack-Cali and other interested parties with respect to the Xanadu Project between 2003 and 2004, as well as the Plaintiffs themselves when they applied to build a new stadium; that process, which was approved by the Appellate Division in In re Xanadu and Hartz, is the same process that should be followed here, requiring dismissal of Plaintiffs' Complaint. Indeed, in the Hartz case the trial court dismissed an action filed by Hartz as premature, finding that the NJSEA is a state agency, and that any appeal of its decisions must be brought to the Appellate Division. 2006 WL 2371348 at *6.

Notably, in November and December 2004, Hartz filed submissions that addressed, among other things, purported problems with the existing traffic studies. Hartz also presented a consultant in the retail development business who performed "a detailed analysis as to the adverse and 'severe' affect on local businesses he anticipated from the Xanadu project." Hartz, 2006 WL 2371348 at *21. The NJSEA addressed each of Hartz's concerns, including whether there was an adverse effect on local businesses, in a 98-page Supplemental Report and

Recommendation. Noting that an appellate court should not second-guess judgments of an administrative agency that fall squarely within the agency's expertise, the Appellate Division affirmed the decision of the NJSEA to proceed with the Xanadu Project. Id. at *18, 20. If Plaintiffs are truly concerned about traffic issues, they should similarly allow the NJSEA to complete its statutory mandate and follow the same administrative process that the Appellate Division approved several years ago. Instead, they are seeking to circumvent it.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE COMPLAINT

As set forth above, the NJSEA is empowered by statute to consider and review the proposed modification to the Xanadu Master Plan for the American Dream Project, and in fulfilling its mandate is following the same administrative process sanctioned by the Appellate Division. To date, Plaintiffs have fully participated in that process but have yet to make any showing—to the NJSEA or any other agency—of the "adverse effect" on their development, use or operation of the stadium that they claim here. Rather than complete the administrative process and allow the NJSEA to fulfill its statutory duties, Plaintiffs are seeking to start anew in a different forum. However, as set forth below, the doctrines of ripeness, primary jurisdiction and exhaustion all bar Plaintiffs' attempts to circumvent the administrative process.

A. Plaintiffs' Claims Based On the Anticipated Effects of the Proposed Modifications to the Xanadu Master Plan Are Not Ripe For Adjudication

Plaintiffs' claims are premature and not ripe for adjudication because the administrative process that will determine the scope of the American Dream Project, including any conditions placed on its operation or construction, has not yet concluded. As stated above, the NJSEA was created by the legislature for the express purpose of, among other things, determining the location, type and character of projects in the Hackensack Meadowlands. N.J.S.A. 5:10-4. Prior

to undertaking any project, however, the NJSEA is statutorily obligated to undergo an exhaustive administrative process, which includes an analysis of any impacts from any proposed projects. The very process that Plaintiffs are now trying to circumvent is the process that the Appellate Division has held is appropriate. See Hartz, 2006 WL 2371348; In re Xanadu, 402 N.J. Super. 607.

In accord with this process, the NJSEA in its June 28th Letter confirmed that it intends to solicit submissions and conduct hearings that will address the very parking and traffic issues of which Plaintiffs now complain. Only when the administrative process described above is complete will the NJSEA consider and finalize the modification to the Xanadu Master Plan, incorporating any conditions it deems necessary to mitigate any potential adverse effects upon the stakeholders. Until the NJSEA makes its final decision, as embodied by the resolution, the scope and parameters of the American Dream Project are subject to modification. Thus, Plaintiffs' allegations that the proposed modification to the Master Plan will have an "adverse effect" on their contractual rights are merely speculative, and must be dismissed. See, e.g., Citizens Action v. Twp. of Mt. Holly, 2007 WL 1930457 *18 (N.J. App. Div. July 5, 2007) (dismissing as premature plaintiff's claims against township alleging disparate impact of state action where redevelopment plan was not final and perceived effects were speculative). The NJSEA must be permitted to complete the administrative process, which will determine any effects on Plaintiffs' development, use or operation of the stadium, before Plaintiffs' contractual rights can be determined. Once that determination is made, any interested parties, including the Plaintiffs, have a right to appeal it to the Appellate Division. Consequently, at this time, this lawsuit is not ripe and this Court does not have jurisdiction to address its merits.

Plaintiffs claim that an "actual case or controversy exists" between the parties over the "scope and nature of the Stadium Entities' rights under the Cooperation Agreement." See Complaint at ¶¶ 48, 54. However, as explained by the Appellate Division, "a ripe case involves a real and substantial controversy for which specific relief may be provided through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical set of facts." Citizens in Action, 2007 WL 1930457 at *16. Claims are ripe for decision when the issues are fully developed, clearly defined and not merely speculative, conjectural or premature. Id. (internal quotations omitted). In the present situation, because the proposed modification has not even been approved by the NJSEA, and construction has not started, there is no harm, let alone the type of imminent harm necessary to support Plaintiffs' claims for declaratory and injunctive relief. See, e.g., Sarmanoukian v. Chemtek at Alpine, LLC, No. BER-C-367-05, 2005 WL 3005777 at *3 (N.J. Super. Ch. Div. Nov. 4, 2005) (application for injunctive relief was denied in part for failure to establish immediate and irreparable harm; because a foundation wall intended to support an adjacent building had not yet been constructed, this Court found that plaintiffs were only arguing a mere possibility as to irreparable harm).

At this stage, the Court would be giving nothing more than an impermissible advisory opinion as to the parties' alleged contract rights. See N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't of Human Servs., 89 N.J. 234, 241 (1982) (courts will not render advisory opinions or function in the abstract nor will they decide a case based on undeveloped or uncertain facts) (internal citations omitted); Civil Serv. Comm'n of N.J. v. Senate of N.J., 165 N.J. Super. 144, 147 (App. Div. 1979) (dismissing complaint seeking declaratory relief on the sole ground that there was no justifiable controversy, stating the trial judge "should not have attempted to declare the rights or the status of parties upon a statement of facts which is future, contingent and

uncertain, amounting to an advisory opinion"); Friedland v. State of N.J., 149 N.J. Super. 483, 495 (Law Div. 1977) ("The settled policy of the law in this State is to refuse advisory opinions and refrain from functioning in the abstract in a declaratory judgment action") (internal citation omitted).

On the other hand, allowing the NJSEA to complete its administrative process will allow time for the factual record to be fully developed, for the scope of the Project to be fully and clearly defined, and may fully resolve the issues between the parties by mitigating any perceived "adverse effect." For these reasons, Plaintiffs' claims must be dismissed as not ripe for adjudication. Citizens in Action, 2007 WL 1930457 at *17-18.[6]

B. This Court Should Dismiss the Case Under the Doctrine of Primary Jurisdiction Until the NJSEA Has Made Its Factual Determinations and the Administrative Process Is Complete

If for some reason this Court finds that the lawsuit is ripe and that it has jurisdiction to hear the dispute, it should nonetheless invoke the doctrine of primary jurisdiction and decline to do so at this time. It is beyond dispute that in order to adjudicate whether Plaintiff has the contractual right to demand prior written consent, it must first be determined whether the modification to the Master Plan has an "adverse effect" on Plaintiffs' development, use or operation of MetLife Stadium.

That determination will be made through this administrative process by the very agency that has the authority, experience and expertise to make such determinations. At the very least, in accordance with its June 28th Letter, the NJSEA will conduct hearings, receive evidence, and

[6] Because this matter is premature for adjudication at this time, Developers will not set forth all their defenses and objections to the Complaint, including but not limited to, the scope and meaning of the Cooperation Agreement and its application to the various land parcels at issue, and Plaintiffs' waiver of their claims, all of which are expressly reserved.

prepare reports that would ultimately be available to the Court to assist it in interpreting the contract and determining the impact, if any, of the proposed modification.

Indeed, Plaintiffs have admitted "as part of the statutorily mandated public comment process" that they have already raised similar issues with the NJMC and NJDEP by letter dated January 18, 2012. (Complaint ¶ 40.) During the process, Plaintiffs not only claimed that they would be adversely effected by increased traffic congestion and parking on game days, but specifically raised the very contractual issues that are the subject of this pending lawsuit. These same issues will be directly addressed in the public hearings the NJSEA intends to hold. See June 28th Letter. That the NJSEA intends to address these very concerns and make the requisite factual findings as to the issues underlying Plaintiffs' Complaint warrants the Court declining jurisdiction and dismissing the Complaint under the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction requires the Court to dismiss and defer any determination of "adverse effect" until the reviewing agencies have made their factual determinations and the administrative record is fully developed. Indeed, the proper balance between the courts and administrative agencies in this regard is succinctly set forth by the New Jersey Supreme Court in Boss v. Rockland Elec. Co., 95 N.J. 33, 36 (1983):

> This appeal concerns the relationship between a court and an administrative agency in determining the legal rights of parties when resolution of a dispute depends in part upon determination of factual issues that have been placed within the special competence of the administrative body. We hold that the proper procedure in this case is for the court to refer the factual issues to the agency for its findings.

If the administrative process runs its course, the NJSEA determines there are no adverse effects, and that finding is upheld by the Appellate Division, this case would be moot. As a result, this Court should invoke primary jurisdiction to allow the administrative process to conclude. Boss, 95 N.J. at 40. As the Supreme Court in Boss concluded, the trial court "should

accept the factual determinations of the agency and lay them against the legal issues to be resolved and enter its final judgment resolving the mixed questions of law and fact based upon the agency fact finding." 95 N.J. at 42.

Proceeding in such a fashion would avoid piecemeal litigation and duplicative, anomalous or contradictory results, as well as allow the NJSEA—the administrative agency with the statutory authority and primary interest—to sort out the underlying issues. As a matter of comity, courts should defer to administrative agencies whenever issues within the case involve the special competence of the administrative agency. See Forsgate Indus. Complex, L.P. v. Leggett & Platt, Inc., 2006 WL 2587637 (N.J. App. Div. 2006) (dismissing case without prejudice to allow NJDEP to consider plaintiff's claims in the first instance, given its extensive history with the property and its technical expertise, as doing so could assist in the resolution of the matter).

When central aspects of the dispute are already pending before an administrative agency, as they are here, logic dictates that the entire matter be dealt with by the entity or entities with plenary authority over the subject matter involved. See Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 425 (App. Div. 2002). Plaintiffs have had or will have a chance to make submissions and/or object within each step of the administrative process. They should not now be permitted to simply extract themselves from that process and start all over again in court.

The conclusion that this Court should dismiss this case to allow the administrative agencies to complete the process that began when the NJSEA preliminarily approved an amendment to the Xanadu Master Plan is not altered by the fact that Plaintiffs allegedly filed suit to protect their contractual rights. Indeed, in Boss, Plaintiff filed its lawsuit to protect its

contractual easement rights. 95 N.J. at 37-38. Nonetheless, since an administrative agency was already addressing the issue, the court deferred to the administrative process. Id. at 38-40. In doing so, the Supreme Court noted:

> Comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter.

Id. at 40; see also Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74 (App. Div. 1999) (holding that administrative agency and not the Court should determine what "actual costs" means in the parties' contract); Bd. of Educ. of Twp. of Middletown v. Witmer, 2009 WL 2486640 (N.J. App. Div. August 17, 2009) (finding that Commissioner properly invoked jurisdiction because contractual issues were integrated with issues before the administrative agency, and thereby denying request that matter be heard by Superior Court); Archway Programs, 352 N.J. Super. at 431 (finding that where, as here, a contract bears upon a larger controversy pending on the administrative level, court should await all interrelated issues of law between the parties until the administrative agency has resolved all questions within its purview). There can be no doubt that, by virtue of its statutory authority and expertise, NJSEA is in the best position to resolve the factual issues raised by Plaintiffs' Complaint.

The Court in Boss also noted that it was certainly possible, as could be the case here, that once the agency decided the issues within their purview, that there would no longer be "as a practical matter, factual issues left for the trial court to decide," in which case the lawsuit could be moot. 95 N.J. at 431-32. This additional factor, which promotes efficiency within the court system, is yet another reason the Court should invoke the doctrine of primary jurisdiction here.

C. Plaintiffs Should Be Required to Exhaust Their Administrative Remedies

The Complaint should also be dismissed due to Plaintiffs' failure to exhaust their administrative remedies. Enforcement of the requirement of exhaustion in this case would serve three specific goals: (1) fostering the efficient resolution of claims before a body possessing greater expertise in the relevant subject area(s); (2) development of a complete factual record for the reviewing court; and (3) the promotion of efficiency, in that a potentially favorable resolution of the administrative action could obviate any need for Plaintiffs to go to a court (the Appellate Division or this Court) for relief. See City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). All three goals would be served here by allowing the administrative process to reach its conclusion, and the NJSEA to fulfill its statutory mandate, before allowing this lawsuit to proceed.

Requiring a party to first exhaust its administrative remedies is particularly appropriate where, as here, the lawsuit focuses on subjects—such as Plaintiffs' concerns over traffic and congestion within the Meadowlands—that are not only clearly within the NJSEA's areas of expertise and statutory regulatory authority but also which will be specifically addressed by the NJSEA in the hearings considering the Developers' modification to the Master Plan. See the June 28th Letter.

It is a well-established judicial principle that administrative remedies should be fully explored before judicial action is sanctioned. See Central R.R. Co. v. Neeld, 26 N.J. 172, 178 (1958); Brunetti v. Borough of New Milford, 68 N.J. 576 (1975) (holding that there is a "strong presumption favoring the requirement of exhaustion of remedies"). This principle requires a party to exhaust available procedures, that is, "pursuing them to their appropriate conclusion and,

correlatively ... awaiting their final outcome before seeking judicial intervention." See Garrow v. Elizabeth Gen. Hosp. and Dispensary, 79 N.J. 549, 559 (1979).

The first two elements set forth in Laezza—deference to the agencies' expertise and development of a complete factual record—are particularly important to courts that are asked to require a party who is seeking to litigate legal or constitutional claims to first exhaust administrative remedies. See, e.g., Abbott v. Burke, 100 N.J. 269, 299 (1985) ("this Court has called for exhaustion of administrative remedies when this will serve to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise.") (citations omitted); Brunetti, 68 N.J. at 590 (holding that even where a constitutional issue is involved, plaintiff is required to exhaust administrative remedies unless there are no factual questions requiring an administrative decision). Even if the NJSEA does not determine the exact issue raised by Plaintiffs in the present lawsuit (which it certainly might do based upon the statements in the June 28th Letter), it certainly will make findings of fact based upon expert presentations and other submissions that will be directly relevant to any future judicial proceeding. Under these circumstances, Plaintiffs should be compelled to exhaust their administrative remedies before seeking judicial intervention.[7]

II. PLAINTIFFS' CLAIM OF TORTIOUS INTERFERENCE WITH CONTRACT AGAINST THE DEVELOPERS IS BARRED BY THE NOERR-PENNINGTON DOCTRINE AND IS FACIALLY DEFICIENT

Plaintiffs' tortious interference claim is premature and facially deficient and must be dismissed because there can be no tortious interference claim based on the conduct alleged in the

[7] We note that any judicial intervention sought at the conclusion of the administrative process should be brought in the Appellate Division, and not this Court. See K. Hovnanian Companies of N. Cent. Jersey, Inc. v. N.J. Dep't of Envtl. Prot., 379 N.J. Super. 1 (App. Div. 2005) (in affirming dismissal of complaint on grounds of ripeness and failure to exhaust administrative remedies, the Appellate Division noted that review of any NJDEP action would lie in that Court and not the Law Division).

Complaint. New Jersey courts have consistently followed the Noerr-Pennington doctrine and its progeny in holding that a party cannot be held liable for exercising its constitutional right to petition a government agency, which is all the Developers are alleged to have done here.[8]

Here, the basis for Plaintiffs' claim for tortious interferences arises solely from the "drafting [of] plans and seeking approvals for the American Dream project," which by definition involves the Developers' exercise of a constitutionally protected legal right to petition governmental entities—the NJSEA, the NJDOT and the NJDEP—for the approvals necessary to build and operate their proposed Project. As a result, that claim involves protected government petitioning activity under the First Amendment to the U.S. Constitution, is barred by the Noerr-Pennington doctrine and controlling New Jersey case law, and must be dismissed. Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224, 229-230 (Law Div. 1993) (dismissing on the pleadings tortious interference claim based on petitioning of planning board pursuant to Noerr-Pennington doctrine); see also California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669-70 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

The Noerr-Pennington doctrine has been applied in New Jersey to confer immunity from a variety of tort claims, including tortious interference with contract, where the underlying conduct involves petitioning the government or a branch of the government. See Fraser v. Bovino, 317 N.J. Super. 23, 27-28 (App. Div. 1998) (upholding immunity from liability for tortious interference for challenging zoning board approvals); Structure Bldg. Corp. v. Abella, 377 N.J. Super. 467, (App. Div. 2005) (same); Sussex Commons Outlets, LLC v. Chelsea

[8] This lawsuit is nothing more than a SLAPP suit, which if allowed to proceed, is susceptible to a claim of malicious use of process in accord with LoBiondo v. Schwartz, 323 N.J. Super. 391 (App. Div. 1999).

Property Group, Inc., 2010 WL 3772543 *9 (N.J. App. Div. 2010) (upholding immunity from liability for tortious interference based upon lobbying activities).

Plaintiffs' tortious interference claim is deficient in other critical respects as well. The Complaint does not allege any conduct that rises to the level of actionable malicious conduct and is entirely insufficient to state a *prima facie* claim of tortious interference with contract. A claim for tortious interference with contract must be based on "facts claiming that the interference was done intentionally and with malice," where malice is defined to mean that "the harm was inflicted intentionally and without justification or excuse." Dello Russo v. Nagel, 359 N.J. Super. 254, 268-69 (App. Div. 2003) (citing Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989)). The fact that a party acted "to advance its own interest and financial position does not establish the necessary malice or wrongful conduct." Dello Russo, 359 N.J. Super. at 268 (internal quotations omitted). As explained by the New Jersey Supreme Court, "the ultimate inquiry is whether the conduct was both injurious and transgressive of generally accepted standards of common morality or of law. In other words, was the interference by defendant sanctioned by the rules of the game." Printing Mart, 116 N.J. at 757 (internal quotations omitted); see also Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 204 (App. Div. 1995) (reversing judgment for plaintiff on tortious interference claim based on lawful conduct).

Plaintiffs' Complaint fails to plead any type of unlawful or malicious conduct on the part of the Developers. The only facts alleged in the Complaint to support Plaintiffs' claim of tortious interference involve the Developers "drafting plans and seeking approvals for the American Dream project with knowledge (i) that the NJSEA had not and would not seek and/or obtain the Stadium Entities' prior written consent to that project and (ii) of the adverse effects

that the changes to the Xanadu Project would have on the development, use or operation of the Stadium Project Development Rights." (Complaint at ¶ 52). These conclusory allegations fail to allege any conduct that could be construed as wrongful, unlawful or "transgressive of generally accepted standards of common morality or of law." See, e.g., Nat'l Amusement Inc. v. N.J. Turnpike Auth., 261 N.J. Super. 468, 477 (Law Div. 1992) (dismissing tortious interference claims where defendants did nothing more than what they were statutorily authorized to do); Somers Const. Co. v. Bd. of Educ. for S. Gloucester County, 198 F. Supp. 732, 739 (D.N.J. 1961) (dismissing complaint for failure to plead malicious conduct).

In addition, Plaintiffs fail to allege that any conduct on the part of the Developers caused them any harm. Instead, Plaintiffs claim that drafting plans and seeking approvals from state regulatory authorities with knowledge of the existence of Plaintiffs' contractual rights is enough to impose tort liability. It is not. See Dello Russo, 358 N.J. Super. at 268 (dismissing complaint for failure to identify malicious conduct). As further evidence of their overreaching, Plaintiffs make these allegations against Triple Five Group, Ltd., a holding company with no ownership interest in the American Dream Project, and which did not even engage in the conduct that purportedly forms the basis for the tortious interference claim.

CONCLUSION

For the foregoing reasons, this lawsuit is premature and should be dismissed.

Respectfully submitted,

WOLFF & SAMSON PC

By 
DAVID SAMSON

Dated: July 10, 2012

EXHIBIT A

NEW JERSEY SPORTS & EXPOSITION AUTHORITY

NJSEA

We Bring the World to New Jersey

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June 28, 2012

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c/o Wolff Samson, PC
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West Orange, New Jersey 07052

New Meadowlands Stadium Company LLC
New York Jets LLC
Jets Stadium Development LLC
New York Football Giants, Inc.
Giants Stadium LLC
c/o McCarter & English, LLP
Attn: William J. O'Shaughnessy, Esq.
100 Mulberry Street
Newark, New Jersey 07101

Re: *Master Plan*

Dear Counsel:

Pursuant to section 6.2 of the Redevelopment Agreement, the New Jersey Sports & Exposition Authority ("NJSEA") is in the process of reviewing a proposed "major modification" to the Master Plan submitted on behalf of Triple Five and related entities. As the parties are aware, a resolution conditionally approving the "conceptual design" of this proposed modification was adopted by the NJSEA on October 13, 2011.

As part of the NJSEA's review process—as outlined in the Redevelopment Agreement—the NJSEA's Master Plan Committee will conduct a hearing to review the proposed "major modification" and its conformity with the Master Plan. As part of the review process, the Master Plan Committee will consider any effects the "major modification" may have on the Stadium Entities' development, use or operation of the stadium.

The NJSEA will, in short order, advise all interested parties of the date, time and logistics of the hearing, as well as a schedule for written submissions.

Very truly yours,

Ralph J. Marra, Jr.

Via UPS Next Day Air

EXHIBIT B

NEW JERSEY SPORTS & EXPOSITION AUTHORITY

NJSEA

We Bring the World to New Jersey

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July 5, 2012

VIA EMAIL & REGULAR MAIL

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Metro Central LLC
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New York Jets LLC
Jets Stadium Development LLC
New York Football Giants, Inc.
Giants Stadium LLC
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Attn: William J. O'Shaughnessy, Esq.
100 Mulberry Street
Newark, New Jersey 07101

Re: New Jersey Sports & Exposition Authority - Master Plan Committee

Dear Counsel:

As you were advised by correspondence dated June 28, 2012, the New Jersey Sports & Exposition Authority ("NJSEA") is convening its Master Plan Committee to conduct a review of a proposed "major modification" to the Master Plan submitted by Triple Five Group, Ltd. ("Triple Five"). On behalf of the Master Plan Committee, I have been directed to request written submissions from Triple Five and from the Stadium Related Entities (as defined in the Cooperation Agreement, dated November 22, 2006) in advance of the Master Plan Committee's consideration of the proposal.

All written submissions in support of, or in opposition to, Triple Five's proposed "major modification" should be submitted to my attention via hard copy, with electronic copies submitted via e-mail simultaneously, on or before Friday July 20, 2012 at 2:00 p.m. Following the Master Plan Committee's review of the written submissions, I will advise the parties of the time and place of a hearing, at which time each interested party will be provided an opportunity to address the Committee. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Ralph J. Marra, Jr., Esq.

cc: Gibbons P.C.